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No. 88-1762

In The

Supreme Court for the United States

October Term, 1988

ROBERT KIDD, et al,
Petitioners,

v.

F/V ST. PATRICK, et al.,
Respondents.

AGNES BERGEN, et al.,
Petitioners,

v.

F/V ST. PATRICK, et al.,
Respondents.

RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. ARE PUNITIVE DAMAGES AVAILABLE FOR A WRONGFUL DEATH CLAIM UNDER GENERAL FEDERAL MARITIME LAW WHEN JOINED WITH AN ACTION UNDER DOHSA AND THE JONES ACT?

II. ARE PUNITIVE DAMAGES AVAILABLE FOR A SURVIVAL CLAIM FOR PRE-DEATH PAIN AND SUFFERING WHEN JOINED WITH A WRONGFUL DEATH CLAIM UNDER DOHSA AND THE JONES ACT?

III. DID THE NINTH CIRCUIT ERR IN HOLDING THAT THE TRIAL COURT'S FACTUAL FINDINGS WERE INSUFFICIENT TO SUPPORT AN AWARD OF PUNITIVE DAMAGES TO THE SURVIVING CREW MEMBERS?

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STATEMENT OF THE CASE

The opinion in *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1346-47 (9th Cir. 1987), contains an outline of the facts of this case which is sufficient for discussion of the legal issues presented in Questions I and II. The facts relevant to Question III will be discussed as part of that argument.

ARGUMENT

Introduction

The availability of punitive damages in wrongful death and survival actions arising in admiralty is in some respects a developing area of the law and has generated a great deal of critical commentary. It is among the questions left open by this court's decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970), recognizing a common law cause of action for wrongful death under the common law of admiralty. Of particular interest has been the interaction of the general maritime law with the Death on the High Seas Act (DOHSA), 46 U.S.C. Sec. 761-768, the Jones Act, 46 U.S.C. Sec. 688, and the law of the various states.

The reported decisions cannot all be reconciled into a coherent view of the law, and respondents will not attempt to do so. It *is* possible, however, to reconcile *Bergen* with the decisions of this court, as a necessary and logical successor to those decisions. Indeed, plaintiffs concede that their position is weak so long as those decisions stand. While some inconsistency in the law remains, it is of the sort which needs to be addressed by Congress, not this court.

Statutory Overview

There are four possible sources of law which may be examined in determining whether punitive damages are available in this case. First, there is the Death on the High Seas Act (DOHSA), 46 U.S.C. Sec. 761-768, which provides a cause of action for the death of any person occurring on the high seas beyond three miles from the shore of any state. 46 U.S.C. Sec. 761. Liability in a DOHSA suit may be based upon negligence, unseaworthiness, or strict liability. 46 U.S.C. Sec. 761; *Moragne,* 398 U.S. at 399-401, 90 S. Ct. at 1787-88. DOHSA explicitly provides that damages are limited to pecuniary losses. 46 U.S.C. Sec. 762. It does not include a survival statute to allow recovery of pre-death pain and suffering by the decedent.

The Jones Act, 46 U.S.C. Sec. 688, enacted in 1920 at the same time as DOHSA, extends to seamen the protections of the

Federal Employer's Liability Act (FELA), 45 U.S.C. Sec. 51-59. It provides both a remedy for wrongful death and a survival action. 45 U.S.C. Sec. 51, Sec. 59. It applies both in territorial waters and on the high seas. Liability depends on proving negligence, and there is no Jones Act remedy for unseaworthiness. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 154, 85 S. Ct. 308, 313, 13 L.Ed.2d 199 (1964). Where the wrongful death provisions of the Jones Act are applicable, they will preempt the same cause of action under the general maritime law. *Id.* at 155, 85 S. Ct. at 313-14. Damages for wrongful death under the Jones Act are not explicitly limited to pecuniary losses, but such a limitation has been uniformly accepted by the courts. *See, e.g., Ivy v. Security Barge Lines, Inc.*, 606 F.2d 324, 328 (5th Cir. 1979) (*en banc*), *cert. denied* 446 U.S. 956, *rehearing denied* 448 U.S. 912 (1980); *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 79-80 (9th Cir. 1983). Whether damages are similarly limited in survival actions is an unsettled question.

The general maritime law provides a remedy for wrongful death based upon proof of unseaworthiness. *Moragne*, 398 U.S. at 410, 90 S. Ct. at 1792. The *Moragne* cause of action for wrongful death applies only in territorial waters, because the general maritime law is preempted by DOHSA in wrongful death actions upon the high seas. *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618, 625-26, 98 S. Ct. 2010, 2015, 56 L.Ed.2d 581 (1968) *rehearing denied* ____ U.S. ____, 99 S. Ct. 232. Although this court has not addressed the question, the lower courts have held that the general maritime law includes a survival action, allowing a decedent's estate to recover for pre-death pain and suffering. The few courts which have considered the question have held that punitive damages are available in wrongful death actions and survival actions under the general maritime law.

Finally, plaintiffs sometimes look to state law to provide supplemental remedies not available under federal law. Alaska has both a wrongful death statute, AS 09.55.580, and a survival statute, AS 09.55.570. In *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232, 106 S. Ct. 2485, 2498, 91 L.Ed.2d 174 (1986), this court held that where DOHSA applies, a wrongful death action may not be supplemented by non-pecuniary damages available under state law. *Tallentire* did not decide whether non-pecuniary damages available in survival actions would likewise be preempted by either DOHSA or the Jones Act.

I. ARE PUNITIVE DAMAGES AVAILABLE FOR A WRONGFUL DEATH CLAIM UNDER GENERAL FEDERAL MARITIME LAW WHEN JOINED WITH AN ACTION UNDER DOHSA AND THE JONES ACT?

Plaintiffs acknowledge that punitive damages for wrongful death claims are not allowable under DOHSA or the Jones Act, but they argue that general maritime law or state law may be used to supplement the federal statutory damages allowed. Yet *Bergen* was clearly correct in holding that where death occurs on the high seas, DOHSA provides the exclusive remedy for the negligence and unseaworthiness which caused the death, and that punitive damages are not recoverable under any theory where DOHSA applies.[1] This should be a settled question, and does not merit a grant of certiorari.

Moragne did not answer whether the general maritime law may include punitive damages for wrongful death occurring as a result of unseaworthiness, although several circuit court cases have answered this question in the affirmative. *See, e.g., Evich v. Morris (Evich II),* 819 F.2d 256, 258-59 (9th Cir. 1987) *cert. denied* ____ U.S. ____, 108 S. Ct. 261; *Complaint of Merry Shipping, Inc.,* 650 F.2d 622, 626 (5th Cir. 1981). Whether these holdings are correct must be considered in light of *Higginbotham,* where this court stated that further development of the maritime common law should be guided primarily by DOHSA, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right. *Higginbotham,* 436 U.S. at 625; 98 S. Ct. at 2014. The field is full of inconsistent dicta and refusal to decide the question. *See* Waddell, *Punitive Damages in Admiralty,* 19 J. Mar. L. and Comm. 65, 69-73 (1988).

This debate need not be joined in this case. The law is clear that DOHSA is preemptive as it applies to wrongful death. It preempts both the state law of wrongful death and the general maritime law where Congress has spoken. *Tallentire,* 477 U.S. at 230, 232, 106 S. Ct. at 2497, 2500; *Higginbotham,* 436 U.S. at

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[1] Plaintiffs have rightly abandoned their argument that DOHSA does not apply to the decedents who came back within territorial waters before they died. The accident itself took place on the high seas, making DOHSA applicable by its terms. *See Bergen,* 816 F.2d at 1348.

625, 98 S. Ct. at 2015. While the legislative history of DOHSA is not as useful as it might possibly be, *see Tallentire,* 106 S. Ct. at 2496, it does indicate an intent to preempt state and maritime law on the question of damages. 46 U.S.C. Sec. 762. As this court said in *Higginbotham,*

> The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. The Act does not address every issue of wrongful death law, but when it does speak directly to a question, the courts are not free to "supplement" Congress' answers so thoroughly that the Act becomes meaningless . . . Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements.

Higginbotham, 436 U.S. at 626, 98 S. Ct. at 2015.

Plaintiffs' remedies under DOHSA are limited to pecuniary damages only. *Higginbotham,* 436 U.S. at 623, 98 S. Ct. at 2013; *see also* 46 U.S.C. Sec. 762. It cannot reasonably be disputed that punitive damages are non-pecuniary within the meaning of the statute.[2] *See Kopczynski v. The Jacqueline,* 742 F.2d 555, 561 (9th Cir. 1984), *cert. denied,* 471 U.S. 1136 (punitive damages are non-pecuniary within the meaning of the Jones Act); *Kozar v. Chesapeake & Ohio R. Co.,* 449 F.2d 1238, 1240-43 (6th Cir. 1971) (punitive damages are non-pecuniary within the meaning of the FELA); *see also Complaint of Merry Shipping,* 650 F.2d 622, 626 (5th Cir. 1981) (assuming without deciding that punitive damages are non-pecuniary within the meaning of the Jones Act). According to *Neal v. Barisich, Inc.,* 707 F. Supp. 862, 973 (E.D. La. 1989),

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[2] The plaintiffs appear to have abandoned their earlier argument that the real distinction to be made is not between pecuniary and non-pecuniary damages, but between actual damages (both pecuniary and non-pecuniary) and punitive damages. Plaintiffs contended below that since Congress spoke only to actual damages, a "gap" existed which could be filled with the general maritime law. This argument was quickly and correctly disposed of in *Bergen,* 816 F.2d at 1348-49.

there is no case which holds otherwise. Punitive damages are therefore unavailable to the plaintiffs on their wrongful death claims.[3]

No federal court has awarded punitive damages for a wrongful death claim under general maritime law where DOHSA also applies. After *Higginbotham,* none is likely to do so. There is no need to grant certiorari on this question.

II. ARE PUNITIVE DAMAGES AVAILABLE FOR A SURVIVAL CLAIM FOR PRE-DEATH PAIN AND SUFFERING WHEN JOINED WITH A WRONGFUL DEATH CLAIM UNDER DOHSA AND THE JONES ACT?

Unable to sustain the award as an adjunct to the wrongful death claim, plaintiffs argue that punitive damages can perhaps supplement the award for decedents' pre-death pain and suffering. Yet *Bergen* was correct in holding that where an action under DOHSA is joined with an action under the Jones Act, neither statutory scheme may be supplemented by the general maritime law or state law. *Bergen,* 816 F.2d at 1349.

A. *Punitive Damages Are Not Available for a Jones Act Survival Claim When Joined With a DOHSA Claim.*

Plaintiffs contend that although punitive damages are unavailable under the Jones Act in wrongful death actions, they may be recoverable for personal injuries in Jones Act survival actions on the high seas. This is admittedly an unsettled area of the law. *See* Annotation, *Recovery of Punitive Damages Under the Jones Act or Federal Employer's Liability Act,* 10 A.L.R.F. 511, 525-31 (1972). Three relatively recent Ninth Circuit decisions reflect the lack of uniformity in this area.

In *Cook v. Ross Island Sand & Gravel Co.,* 626 F.2d 746, 749 (9th Cir. 1980), the court stated that while the Jones Act arguably applies a pecuniary loss restriction to the losses of

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[3] A recent comment on the *Bergen* case has described the Ninth Circuit's reasoning as "beyond reproach." "Faced with a statute in which Congress clearly specified a remedy for 'pecuniary loss,' it would be difficult for the court to create an exception . . . Based on the weight of authority, the Ninth Circuit would have had difficulty reaching a different outcome." Note, *Bergen v. F/V St. Patrick: Higginbotham Prevails — No Punitive Damages under the Death on the High Seas Act,* 62 Tulane L. Rev. 1139, 1142 (1988).

decedent's beneficiary, it does not apply such a restriction to the injuries of decedent himself. *See* Sec. 59 of FELA: "[a]ny right of action given by this chapter to a person suffering injury shall survive to his or her personal representative." The court was swayed by the fact that this court has allowed plaintiffs to recover for pain and suffering, *Gillespie v. U.S. Steel Corp.,* 379 U.S. at 156-158, 85 S. Ct. at 313-14, despite the fact that pain and suffering has been held to be a non-pecuniary loss, *Sea-Land Services v. Gaudet,* 414 U.S. 573, 585 n. 17, 94 S. Ct. 806, 815 n. 17, 39 L.Ed.2d 9 (1974). However, *Cook* arose in territorial waters and did not address punitive damages, only damages for mental pain and suffering.

In *Kopczynski v. Jacqueline,* 742 F.2d 555, 560-61 (9th Cir. 1984), the court refused to allow punitive damages for a seaman's personal injuries based upon claims of negligence under the Jones Act. It held that all non-pecuniary damages, including punitive damages, were barred by the Act, without distinguishing between wrongful death and personal injury claims. The court found persuasive the discussion set forth in Dahlquist, *Punitive Damages Under the Jones Act,* 6 Mar. Lawyer 1-36 (1981).

Finally, in *Wildman v. Burlington Northern Railway Co.,* 825 F.2d 1392, 1394-5 (9th Cir. 1987), the Ninth Circuit reexamined *Kopczynski* in deciding that punitive damages are not available for personal injury under the FELA. It considered the law as it existed before enactment, the legislative history of the Act, and subsequent amendments. It found the legislative history to be "ambiguous and inconclusive," and reaffirmed the conclusion it reached in *Kopczynski.* The same conclusion was reached by the Sixth Circuit in *Kozar v. Chesapeake & Ohio Railway Co.,* 449 F.2d 1238, 1240-43 (6th Cir. 1971).[4]

The better rule is that the Jones Act does not contemplate punitive damages either for wrongful death or for survival actions on the high seas. It has generally been held that "absent express Congressional intention, punitive damages [are] not recoverable... on a federally created cause of action." *Burris v. Int'l Brotherhood*

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[4] For an extensive discussion of the legislative history of the FELA which reaches the opposite conclusion, *see* the district court's opinion in *Kozar,* 320 F. Supp. 335, 346-57 (W.D. Mich. 1970), *vacated* 449 F.2d at 1243.

Brotherhood of Teamsters, 224 F. Supp. 277, 280 (W.D. N.C. 1963). Where Congress intends that damages in excess of actual damages be recovered, it has found no difficulty using language to express that intent. *United Mine Workers of America v. Patton,* 211 F.2d 742, 749.50 (4th Cir. 1954), *cert. denied* 348 U.S. 824. *See also* Dahlquist, 6 Mar. Lawyer at 27 n. 138 and citations therein.

Again, this debate need not be joined here. Whether or not punitive damages are available under the Jones Act alone, they are not available where a Jones Act survival claim is joined with a DOHSA wrongful death claim. As *Bergen* reasoned, if punitive damages are allowed as an adjunct to a Jones Act survival claim, they could be awarded in many DOHSA cases, circumventing the intent of Congress. *Bergen,* 816 F.2d at 1349. By denying punitive damages under the Jones Act, the statute remains consistent with DOHSA; it also remains consistent with the reasoning of this court in *Higginbotham.* Where a Jones Act claim is joined with a DOHSA claim, punitive damages are not available.

Although this conclusion may pose "a minor threat to the uniformity of maritime law," *Higginbotham,* 436 U.S. at 625, 98 S. Ct. at 2014, *Bergen* is not a new threat to that uniformity, but rather a continuation of the same minor problems which this court was willing to tolerate in *Higginbotham.* As this court has noted, the need for uniformity is far less compelling where recovery has been made available to the plaintiff and only the measure of damages is at stake. *Higginbotham, id.* at n. 18; *see also* Maraist, *Maritime Wrongful Death — Higginbotham Reverses Trend and Creates New Questions,* 39 La. L. Rev. 96-97 (1978). Questions as to the remaining lack of uniformity are properly addressed to Congress. *See Tallentire,* 106 S. Ct. at 2500.

B. *A General Maritime Survival Claim May Not Be Used to Supplement DOHSA and the Jones Act.*

This court has not yet spoken to the issue of whether the general maritime law permits a survival action, but the lower courts have answered the question in the affirmative. Maraist, 39 La. L.Rev. at 81, 93; *see also Azzopardi v. Ocean Drilling & Exploration Co.,* 742 F.2d 890, 894, (5th Cir. 1984); *Evich v. Connelly (Evich I),* 759 F.2d 1432, 1434 (9th Cir. 1985). Regardless of the answer, a different question is presented when that remedy is used as a "supplement" to DOHSA and the Jones Act.

Several circuit courts have held that because DOHSA is a wrongful death statute and contains no survival provision, "it is entirely appropriate that the court should fill what would otherwise be a legislative void by allowing the general maritime law survival action based on *Moragne* to supplement DOHSA." *Azzopardi,* 742 F.2d at 893; *Barbe,* 507 F.2d at 800; *Evich I,* 759 F.2d at 1434.[5] However, language in *Higginbotham* calls these holdings into question:

> The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, *survival,* and damages.

Higginbotham, 436 U.S. at 626, 98 S. Ct. at 2015 (emphasis added). *Higginbotham* was not a survival action, and it is unclear whether this language is meant to be the final word on the subject of survival actions under DOHSA. *See* Smith, *A Maritime Survival Remedy: Is There Life After Higginbotham?* 6 Mar. Lawyer 185 (1981); Maraist, 39 La. L.Rev. at 94[6]. *Bergen* correctly reasoned that such preemption must at least apply to the award of punitive damages, so that the intent of Congress not be thwarted in a large number of DOHSA cases. *Bergen,* 816 F.2d at 1349.

Unlike DOHSA, the Jones Act contains a general survival provision by way of the FELA. *See* 45 U.S.C. Sec. 59. Just as the wrongful death provisions of DOHSA and the Jones Act preempt a wrongful death action under general maritime law, so should

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[5] In *Azzopardi, Barbe,* and *Evich,* no Jones Act claim was presented.

[6] One commentator notes that the conflict between survival actions at general maritime law and DOHSA could be avoided by this court's decision denying survival damages under maritime common law.

> Such a decision arguably would do no violence to the policies which should dictate the path of maritime tort law. It is one thing to say that the beneficiaries of a person killed in maritime employment can recover nothing; it is quite another to say that those beneficiaries cannot recover, in addition to the damages which they have sustained as a result of the death, the 'windfall' of the damages the victim could have recovered if he had lived.

Maraist, 39 La. L.Rev. at 94.

the survival provisions of the Jones Act preempt a general maritime survival action where the Jones Act is applicable.[7] The Jones Act announces Congress' considered judgment on the maritime survival action. Since the Jones Act denies punitive damages, encouraging the creation of non-pecuniary supplements would run contrary to the intent of the Act.[8]

If punitive damages are allowed as an adjunct to a general maritime survival claim, they could be awarded in the majority of DOHSA cases, creating an exception that would swallow the rule.

> Since few deaths at sea are instantaneous, many DOHSA plaintiffs qualify for Jones Act remedies for pre-death pain and suffering. If all of those actions could be supplemented by the general maritime law, DOHSA's preemption of maritime law would be nullified.

Bergen, 816 F.2d at 1349. *Bergen* properly rejected an award of punitive damages under the general maritime law because such an award would reduce DOHSA and the Jones Act to the status of advice.[9]

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[7] In American Export Lines, Inc. v. Alvez, 446 U.S. 274, 284, 100 S. Ct. 1673, 1678, 64 L.Ed.2d 284 (1980), this court stated that the Jones Act lacks preclusive effect on the general maritime law for personal injury actions within territorial waters, and allowed the spouse of a longshoreman to recover damages for loss of consortium. This court stated in dictum that the Jones Act lacks preclusive effect even as to seamen in territorial waters. However, *Alvez* addressed neither a survival action nor an award of punitive damages. *See also* Annotation, *Propriety of Nonpecuniary Damages Award in Action Joining Jones Act Claim With General Maritime Claim Where Cause of Action Arose on Territorial or Inland Waters,* 53 A.L.R.F. 635 (1981).

[8] In *Merry Shipping,* 650 F.2d at 626, the Fifth Circuit reached a contrary conclusion and permitted punitive damages under a general maritime survival claim even though it was joined with a claim under the Jones Act. However, no DOHSA claim was involved.

[9] According to Gilmore & Black, *Law of Admiralty,* 369-70 (2d ed. 1975), *Moragne* "reduced both DOHSA and the FELA death provisions incorporated in the Jones Act to the level of nonstatutory Restatements." However desirable the expansion of the common law, it must be fit around the existing statutory framework.

C. *State Survival Statutes Are Preempted by General Maritime Law and Federal Statutory Remedies.*

Plaintiffs argue that Alaska Statute 09.55.570, providing for survival of causes of action beyond the death of a party, may be used as a supplement to DOHSA or the Jones Act to justify the district court's award of punitive damages. *See Tommy's Elbow Room v. Kavorkian,* 727 P.2d 1038, 1048-49 (Alaska 1986) (punitive damages are recoverable in tort under Alaska law). Although *Tallentire* specifically declined to address this issue, 477 U.S. at 215 n. 1, 106 S. Ct. at 2491 n. 1, it is clear that application of a state survival statute would be completely inconsistent with the law following *Moragne.* Assuming the general maritime law includes a survival action, it must preempt the application of state survival statutes just as state wrongful death statutes are now preempted under *Tallentire. See Wildman,* 825 F.2d at 1395, *Evich II,* 819 F.2d at 258. The need for uniformity requires the preemption of state statutes where the general maritime law applies. *See Nygaard v. Peter Pan Seafoods, Inc.,* 701 F.2d 77, 80 (9th Cir. 1983); *Barbe,* 507 F.2d at 798. The general maritime survival claim is in turn preempted here by DOHSA and the Jones Act.

III. DID THE NINTH CIRCUIT ERR IN HOLDING THAT THE TRIAL COURT'S FACTUAL FINDINGS WERE INSUFFICIENT TO SUPPORT AN AWARD OF PUNITIVE DAMAGES TO THE SURVIVING CREW MEMBERS?

The claims of the two survivors of the St. Patrick accident are not covered by DOHSA, but rather by a negligence action under the Jones Act and an unseaworthiness action under the general maritime law. *Bergen,* 816 F.2d at 1349 n. 3. The reasoning applied in the argument *supra* would suggest that where federal statutes are applicable on the high seas they are preemptive, ruling out the possibility of punitive damages for unseaworthiness under the general maritime law.[10] However, *Bergen* did not reach this legal

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[10] There may be some distinction to be made between actions for negligence and actions for unseaworthiness, thereby leaving room for the argument that the Jones Act has not preempted the field. This issue was specifically left undecided in *Ivy,* 606 F.2d at 528 n. 8. However, punitive damages for unseaworthiness are even less appropriate than for negligence, since the general maritime law of unseaworthiness is akin to strict liability. *See* discussion *infra.*

issue because the court correctly found the factual basis for the awards to be clearly erroneous.[11] *Bergen's* reversal of the trial court does not constitute an unacceptable course of judicial proceedings requiring an exercise of this court's supervision.

In awarding punitive damages for unseaworthiness under the general maritime law, the trial court's legal reasoning was as follows:

> A condition precedent to awarding punitive damages is a showing by the claimants that [the owners] were guilty of gross negligence or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct.
>
> It has specifically been held that punitive damages may also be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing that master.
>
> The acts of petitioners in permitting and at least impliedly directing the vessel to proceed with unlicensed officers were done knowing, or having reason to know, of facts which would lead a reasonable man to realize not only that their conduct created an unreasonable risk to the crew, but also that such risk is reasonably greater than that which is necessary to render their conduct negligent.

Appendix A to Petition for Certiorari at A35-36. The Ninth Circuit reversed, holding that the trial court's findings supported a finding of negligence, but not the willful conduct necessary to support punitive damages in an action for unseaworthiness.

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[11] In the Ninth Circuit, counsel for the owners (no longer counsel before this court) did not argue that punitive damages were unavailable as a matter of law. *Bergen* hinted that were the court to review this issue, it would not necessarily follow the Fifth Circuit in *Merry Shipping* by allowing punitive damages where an unseaworthiness action is joined to an action under DOHSA and the Jones Act. If this court chooses to review this issue, the owners urge it to consider the preemption argument raised *supra*.

Bergen, 816 F.2d at 1349; *see Merry Shipping,* 650 F.2d at 625.[12] A review of the trial court's factual findings reveals that this reversal should be upheld on appeal.

The trial court's findings as to the conduct of the owners with respect to the licensing requirements are set out in Petitioner's Brief at Appendix A; of most relevance are findings 34-65. These findings demonstrate that the three owners knew the master and first mate of the F/V ST. PATRICK were unlicensed to sail on the high seas off the coast of Alaska (findings 44, 46, 51), that they were concerned about failure to meet this requirement and urged the master and first mate to attend to it (findings 38, 41, 46), and that they allowed the ship to go scalloping on the high seas knowing that the requirement had not been met (findings 46, 49, 51). The trial court found that operating the F/V ST. PATRICK without licensed officers was manifestly unsafe (finding 39), and that failure to have licensed officers was in all likelihood the primary cause of the accident (finding 63). The court concluded that this failure was "willful, wanton, and contemptuous" (findings 45, 46, 51), and that is was "in reckless disregard of the safety of the F/V ST. PATRICK's crew in the pursuit of financial gain" (findings 45, 46, 51).

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[12] The petitions for certiorari in this case try to create a question of law where none exists. Plaintiffs maintain that *Bergen* applied an incorrect standard of proof for punitive damages by allowing punitive damages only where "a ship owner has willfully violated the duty to furnish and maintain a seaworthy vessel." *See Merry Shipping,* 650 F.2d at 625. Plaintiffs maintain that the correct standard is "criminal indifference," derived from this court's opinion in Smith v. Wade, 461 U.S. 30, 51, 103 S. Ct. 1625, 1638, 75 L.Ed.2d 632 (1983). *See also* Protectus Alpha Navigation Co., Ltd. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985) (punitive damages under the general maritime law may be imposed for conduct which manifests "reckless or callous disregard" for the rights of others); In re Marine Sulfur Queen, 460 F.2d 89, 105 (2d Cir. 1972), *cert. denied sub nom* Marine Sulfur Transport Corp. v. Heard, 409 U.S. 982 (1972) (conduct which shows "gross negligence or actual malice or criminal indifference.") The trial court's award was based upon a melange of the standards, and the *Bergen* court did not concern itself with distinguishing among them. Under the Ninth Circuit's reasoning, the findings of fact do not support an award of punitive damages under any of these standards.

The owners did not dispute the trial court's finding of unseaworthiness. The duty to provide a seaworthy ship is absolute and nondelegable, and the owners' duties were not conditioned on notice or fault. *Deakle v. John E. Graham & Sons,* 756 F.2d 821, 825-26 (11th Cir. 1985). Because the F/V ST. PATRICK was not in compliance with the requirements of the Officer's Competency Certificate Act at the time of the casualty, the owners were *per se* negligent. Nonetheless, violation of the statute by itself will not justify an award of punitive damages.

No evidence was introduced from which it could be inferred that any of the owners had reason to believe that the F/V ST. PATRICK was unseaworthy or that the officers were not in fact competent to carry out their duties. On the contrary, it was undisputed that the F/V ST. PATRICK was a physically seaworthy boat and that the owners reasonably believed that the master and first mate were experienced and competent seamen fit for their assigned duties, apart from the licensing requirement. Both the master and first mate had years of experience running similar vessels in scalloping operations in the North Atlantic, and had the requisite qualifications to be licensed under the Officer's Certificate Competency Act. Under these circumstances, the owners reasonably believed that failure to fill out the paperwork was a violation of a technical requirement unrelated to the safety of the crew.

While the owners acknowledge that this failure constitutes *per se* negligence under a strict liability statute, and actual negligence as well, it does *not* demonstrate either "gross negligence or actual malice or criminal indifference," "reckless or callous disregard" or "reckless and wanton misconduct." Because the master and first mate were otherwise qualified to perform their duties and had only to fill out the proper paperwork in order to do so, it cannot be said that the owners were criminally indifferent or reckless as to the safety of the crew. It is enough that the owners have been made liable by virtue of strict liability; imposition of punitive damages is not warranted and is unsupported by the record. The *Bergen* court was properly left with "the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 92 L.Ed. 746, 766, 68 S. Ct. 525 (1948). In any case, *Bergen's* reversal of the trial court does not constitute an unacceptable course of judicial proceedings requiring an exercise of this court's supervision.

CONCLUSION

Bergen reaffirmed that DOHSA provides only pecuniary remedies for wrongful death on the high seas and preempts any claim for punitive damages under the general maritime law. This should be a settled question after *Higginbotham,* and a grant of certiorari is unnecessary.

Bergen also held that whether or not punitive damages for unseaworthiness are available to the survivor of an accident under general maritime law, they are not available here where the trial court's factual findings fail to demonstrate anything more than negligence on the part of the owners. This does not constitute an unacceptable course of judicial proceedings requiring an exercise of this court's supervision.

Finally, *Bergen* held that punitive damages for pre-death pain and suffering under the general maritime law or state law are not available to supplement an action under DOHSA and the Jones Act. Although this is currently an unsettled area of the law, *Bergen* is a correct and logical successor to this court's earlier decisions. If certiorari is to be granted at all, the owners suggest that it be limited to this one issue. *See Higginbotham,* 436 U.S. at 621, 98 S. Ct. at 2012.

Respectfully submitted.

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APPENDIX

ALASKA STATUTES RELIED UPON

Sec. 09.55.570. All causes of action survive. All causes of action by one person against another, whether arising on contract or otherwise, except those involving defamation of character, survive to the personal representatives of the former and against the personal representatives of the latter, but this shall not be construed so as to abate an action for a wrong where any party has died after the verdict or to defeat or prejudice the right of action given by AS 09.15.010. The personal representatives may maintain an action thereon against the party against whom the cause of action accrued, or, after the party's death, against the personal representatives of the party.

Sec. 09.55.580. Action for wrongful death. (a) When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. The action shall be commenced within two years after the death, and the damages therein shall be the damages the court or jury may consider fair and just. The amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children, or other dependents. When the decedent is survived by no spouse or children or other dependents, the amount recovered shall be administered as other personal property of the decedent but shall be limited to pecuniary loss. When the plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

(b) The damages recoverable under this section shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

(c) In fixing the amount of damages to be awarded under this section, the court or jury shall consider all the facts and

circumstances and from them fix the award at a sum which will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations of what the deceased may have saved during the lifetime of the deceased;

(2) loss of contributions for support;

(3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;

(4) loss of consortium;

(5) loss of prospective training and education;

(6) medical and funeral expenses.

(d) The death of a beneficiary or beneficiaries before judgment does not affect the amount of damages recoverable under this section.

(e) The right of action granted by this section is not abated by the death of a person named or to be named the defendant.